

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications)	FCC 99-238
Act of 1996)	

JOINT COMMENTS

The National Exchange Carrier Association, Inc. (NECA), National Rural Telecom Association, National Telephone Cooperative Association, and Organization for the Promotion and Advancement of Small Telecommunications Companies (jointly, The Associations) submit these comments in response to the Commission's Fourth Further Notice of Proposed Rulemaking (FNPRM) in the above captioned matter.¹

In the FNPRM, the Commission considers whether it has authority to limit the ability of interexchange carriers (or other access customers) to obtain combinations of loop and transport unbundled network elements (UNEs) from local exchange carriers (LECs) to use as a substitute for special access services offered by those carriers.² Additionally, the Commission invites parties to refresh the record on whether requesting carriers may use these facilities in conjunction with unbundled switching to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.³

As the Associations and other parties have made clear in this proceeding, allowing interexchange carriers to use UNEs priced on a forward-looking cost basis, to substitute

¹ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238 (rel. Nov. 5, 1999)(FNPRM).

² *Id.* at ¶ 494.

³ *Id.* at ¶ 496.

for access services priced on the basis of the Commission's Part 36 and 69 rules, would completely undermine the Commission's access charge plan and cause serious harm to LECs and their customers. Accordingly, the Commission must continue its prohibition on the use of UNEs as a substitute for access services, until such time that it completes its reform of current separations and access charge rules.

The Commission has ample authority to prohibit the use of unbundled network elements in this manner. Section 251(c) of the Telecommunications Act of 1996⁴ (1996 Act) requires LECs subject to interconnection requirements to provide access to unbundled network elements "on rates, terms and conditions that are just, reasonable and nondiscriminatory"

Section 251(g) of the 1996 Act further states that:

each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.⁵

Restrictions on the use of UNEs as a means of evading access charges are eminently "reasonable", considering the drastic consequences that would flow if an

⁴ 47 U.S.C. § 251(g).

⁵ *Id.*

alternative course is adopted.⁶ The language of section 251(g), quoted above, also makes clear that Congress intended *no* provision of the 1996 Act (including the interconnection requirements of section 251) to supersede established interstate Commission rules, absent a considered decision by the Commission. The legislative history for the Senate bill version of section 251 of the Act is even more explicit: “[N]othing in this section is intended to affect the Commission’s access charge rules.”⁷

A ruling that permits interexchange carriers to obtain UNEs solely as a substitute for interstate access services (*i.e.*, without provision of local services) would not just “affect” the Commission’s access charge rules – it would completely undermine them, and the Commission’s jurisdictional separations rules to boot. These rules require carriers to allocate joint costs between the interstate and intrastate jurisdictions, and to recover interstate costs through the Part 69 access charge structure. If the equivalent of access service can be obtained in the form of UNEs, IXC’s increasingly will opt for the

⁶ The Commission’s findings in the *Local Competition Order* regarding the reasonableness of service-related restrictions on unbundled network elements, *see* 11 FCC Rcd at 15634, ¶ 264, must be considered in light of the Supreme Court’s subsequent action in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct 721, 735 (1999). There, the Court rejected the Commission’s decision insofar as it required “blanket” access to unbundled network elements on an unrestricted basis, without consideration of the “necessary” and “impair” standards set forth in section 251 of the Act. It is patently unreasonable to argue the access to UNEs is “necessary”, when that access is sought solely for the purpose of evading carriers’ tariffed access charges.

⁷ Telecommunications Act of 1996, H.R. Report 104-458, *Joint Explanatory Statement* at 117. More fully, the passage excerpted above reads: “The obligations and procedures prescribed in this section [251] do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under Section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commission’s access charge rules.”

lower-priced substitute. As the access customer base diminishes, access rates will rise in a futile attempt to recover the interstate revenue requirement. With fewer customers for access services, significant shortfalls in recovery of costs will occur. To the extent these costs are eventually reallocated to the local jurisdiction, local rates will rise and universal service will suffer – a result manifestly at odds with the goals of the 1996 Act.

The record in this proceeding is replete with evidence that the Commission's access charge regime, and collaterally universal service itself, will be threatened by allowing carriers to use UNEs to substitute for exchange access services.⁸ The Commission itself has found that it has “ample legal authority”, pursuant to sections 4(i) and 251(g) of the Act, to require carriers obtaining UNEs as a substitute for access services to pay access charges, at least temporarily.⁹ To do otherwise, the Commission found, would be “undesirable as a matter of both economics and policy, because carrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and our universal service scheme, rather than the unfettered operation of a competitive market.”¹⁰

Restrictions on the use of UNEs, therefore, must remain in place until the

⁸ See, e.g., CC Docket No. 96-98, SBC Telecommunications, Inc. *Ex Parte* (filed Aug. 11, 1999), Attachment (“The Commission's Authority to Place Limits on Use of Unbundled Loops and Transport to Bypass Access Charges”) at 4-5 (SBC *Ex Parte*); *BellSouth, Ex Parte* (filed Aug. 9, 1999) at 1 (BellSouth *Ex Parte*).

⁹ See Implementation of the Local Competition Provision in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, *First Report and Order*, 11 FCC Rcd 15499 at 15862-69 (1996).

¹⁰ *Id.* at ¶ 719.

Commission fully resolves the complex, interrelated issues addressed in its separations, access charge and universal service reform proceedings. The 1996 Act does not require the Commission to abdicate responsibility for its access charge plan. To the contrary, the Act contemplates that current interstate cost recovery mechanisms will remain in place, until the Commission takes specific, considered action to revise them. The Commission must, therefore, permit current, reasonable restrictions on the use of UNEs to remain in place, pending full harmonization of existing accounting, separations and access charge rules with the new interconnection regime.¹¹

Conclusion

The Commission has both the authority and the responsibility under the Telecommunications Act to assure that the existing access charge structure remains viable pending comprehensive separations and access charge reform. Pending completion of proceedings to reform the Commission's separations, access charge and universal service rules, the Commission may not prohibit LECs from restricting

¹¹ Restrictions on the use of UNEs, presumably, will no longer be necessary after the Commission takes action to harmonize its Part 32, 36, 69 and 51 cost allocation and pricing rules, such that one set of rules does not act to undermine the others. In this sense, restrictions on use of unbundled network elements could be considered interim measures, and a reviewing court would be likely to accord even greater deference to a Commission interpretation of the "just and reasonable" language of section 251 of the Act that permits such restrictions to remain in place pending real separations and access charge reform. *See, e.g., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1072-75 (8th Cir. 1997).

availability of UNEs when used for the purpose of avoiding interstate access charges.

Respectfully submitted,

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